

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

**ASSOCIATED FISHERIES OF
MAINE, INC., ET AL.,**

PLAINTIFFS

v.

**MICHAEL KANTOR, SECRETARY
OF COMMERCE, ET AL.,**

DEFENDANTS

Civil No. 94-89-P-H

ORDER

The administrative record in this case, according to the lawyers, involves some 30,000 pages incorporating much biological and statistical data concerning the rise and fall in population of certain fish species, economic data concerning the fishing industry and other matters involving technical or scientific expertise. I have concluded that it may assist me in carrying out my judicial review function to hear commentary from people who are expert in these fields, but not necessarily lawyers. *This is not to be considered testimony or evidence, but is more akin to advocacy, presented in this case by persons skilled in the underlying subject matter area.* Accordingly, I will permit the plaintiffs to present three (3) hours of such commentary. The defendants will likewise be permitted three (3) hours. The plaintiffs will then be permitted thirty (30) minutes of rebuttal (unless they choose to allocate their time differently). Question and answer format will be followed to this

extent: I will expect and permit the lawyers to ask questions necessary to keep their expert commentators within time limits on the relevant topics that will be helpful to the court and to keep them from straying into areas that may interest the speaker, but may not be helpful to my decision. Since this is not evidence, the rules of evidence will not apply.

I am aware that some courts have taken expert testimony in order to assist their understanding of an administrative record. See, e.g., ASARCO, Inc. v. U.S.E.P.A., 616 F.2d 1153, 1159-60 (1980) (finding that district court “went too far” in its consideration of evidence outside the administrative record, but acknowledging that a court may require testimony that is “explanatory in nature”); J.H. Miles & Co., Inc. v. Brown, 910 F. Supp. 1138 (E.D. Va. 1995); Fishermen’s Dock Coop., Inc. v. Brown, 867 F. Supp. 385 (E.D. Va. 1994), rev’d on other grounds, 75 F.3d 164 (4th Cir. 1996). This is a variation on such procedures, but I reiterate that this is neither testimony nor evidence, but instead is commentary or argument by nonlawyers in an area where they have particular subject matter expertise. I realize that the plaintiffs have requested the opportunity to cross-examine some of the experts that the government relies upon in defending the Secretary’s decision, but I find no reason to permit such cross-examination and conclude that it is more likely to divert the court into evidentiary-type presentations than to be helpful to my decision. Instead, I am permitting each side to present people of its own choice to assist the court in understanding this huge record.

The Clerk’s Office will set aside a day for this proceeding early in the new year.

I also observe that the plaintiffs’ reply memorandum raises a new issue concerning the authority of the Secretary in light of appropriations legislation. The Secretary has not had an opportunity to respond. Accordingly, the Secretary shall file any responsive memorandum on that issue alone by December 31, 1996. The response shall be limited to five (5) pages.

SO ORDERED.

DATED THIS 18TH DAY OF DECEMBER, 1996.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE